In this case three witnesses spoke of the accused having a revolver, but only one of them gave evidence of his shooting with it. In summing up to the assessors the learned trial Judge referred to "the evidence of the three witnesses of the actual shooting."

Held, that this constituted a misdirection.

In summing up, the evidence in favour of the accused must be put to the Assessors. In this case the learned trial Judge used the phrase "I do not propose to comment on the evidence of the two Japanese witnesses."

Held, that this constituted a misdirection.

CRIMINAL APPEAL.

C. Mills for the Appellant.

C. H. Whitton (Crown Counsel) for the Respondent.

The Judgment of the Court of Appeal was given by :—

Willan, C. J. : — The appellant was charged with committing the murder of one Lim Yoke Chu on the 31st day of March, 1944.

The appellant was working for the Japanese police during the occupation, and, on the day in question, went with a party of police to effect the arrest of certain persons in a house near Rawang. This party of police arrived at the house about 6 a.m. on a misty morning.

The question of visibility was raised in this appeal and was an important matter as regards the identification of the appellant.

The case against the appellant centres on the evidence of the third prosecution witness, Chan Choy, who gave evidence that he saw the appellant shoot the deceased with a revolver. Two other prosecution witnesses gave evidence that they saw the appellant at the scene carrying a revolver. In addition, the third prosecution witness gave evidence that the deceased made a dying declaration that it was the appellant who had shot him.

The appellant, in his defence, admitted he was in the party of police at the scene and that there had been some shooting. He denied that he had shot and killed the deceased. He called two witnesses in his defence, the second of whom, a Sergeant Major of the Japanese Kempeitai, stated that he thought the appellant was with him at the time of the shooting and that whilst the appellant was so with him he, the appellant, did not fire a shot.

In summing up to the Assessors the learned trial Judge said : — "the evidence of the three witnesses of the actual shooting". As stated above there was only one witness to the actual shooting i.e. the third prosecution witness.

On the question of visibility, which as already stated, was an important matter, he correctly put to the Assessors the following extract from the evidence of the fourth prosecution witness : — "There was not sufficient light to see anything". But the learned trial Judge added, by way of comment : — "I think he meant he could not see anything in-doors". We cannot find any evidence to support that comment.

Lastly, we can find nowhere in the summing-up that the learned trial Judge put to the Assessors the evidence of the Japanese Sergeant Major mentioned above. This was evidence in favour of the appellant and should have been put to the Assessors. The learned trial Judge dismissed that evidence and the evidence of the first defence witness, another Japanese, in the words : — "I do not propose to comment on the evidence of the two Japanese witnesses".

In our view, all these three matters amount to misdirection of the Assessors, and on that ground we allowed the appeal and quashed the conviction and sentence.

Appeal Allowed.
Conviction and Sentence Quashed.

PUBLIC PROSECUTOR v. WEE SWEE SIANG.

[Cr. App. Juris. (Callow, J.) March 19, 1948]
[Malacca — Misc. Application No. 1 of 1948]

Criminal Procedure Code, s. 395 — Application for bail — Principles on which the Court should act.

The Court has a discretion in granting bail or to refuse it and should consider all the circumstances of the case. The Court cannot however go into the alleged facts to consider whether the accused should be properly charged under one section or another. Where the accused is charged with an offence under s. 395 of the Penal Code and it is not shown that the refusal to grant bail would prejudice the accused in the preparation of his defence, bail can properly be refused.

Case referred to : —

(1) *R. v. Hutchinson,* I.L.R. 53 All. at p. 938.

MAGISTRATE'S APPEAL.

J. Kilner, Deputy Public Prosecutor, for the Public Prosecutor.

W. H. Salt for the Applicant.

Callow, J. : — This is an application for bail made in accordance with the provisions of section 395 of the Criminal Procedure Code.

Mr. Salt appeared for the accused and was heard. Mr. Kilner, the Deputy Public Prosecutor, opposed the application.

In the first place I must guard against any expression likely to, or possible to be construed as, indicating my view of the case. Indeed it is to my disadvantage in considering this application that I know so little of the evidence which it is intended to adduce.

I am therefore of the opinion that I am not at liberty to consider whether the charge against the accused should be for the contravention of section 395 or 161 of the Penal Code. Mr. Salt emphasised that the alleged facts supported a charge under the latter section, and thus the offence was one in which bail should be granted (Vol. I *Laws of the Straits Settlements* page 542). The learned Deputy Public Prosecutor had little information as to the nature of the prosecution evidence, and in any event I feel it would be improper and impossible for this Court to decide that the accused should be charged under section 161 of the Penal Code, and in consequence bail should be granted.

There are set out in the 2nd Edition of *Mallal's* Criminal Procedure Code at page 377 nine points which the Court may take into consideration when granting or refusing bail; they are :—

(1) Whether there was or was not reasonable ground for believing the accused guilty of the offence. (On this the Court was afforded no information. It could have been supplied by affidavit, R. v. **Hutchinson**(1)).
(2) The nature and gravity of the offence charged. (Clearly the alleged offence is grave).
(3) The severity and degree of punishment that might follow. (Extortion is receiving exemplary punishment; the maximum is 3 years imprisonment or fine or whipping, or any two of such punishments).
(4) The danger of the accused absconding if released on bail.
(5) His character, means and standing.
(6) The danger of the offence being continued or repeated.
(7) The danger of the witnesses being tampered with.
(8) Opportunity to the accused to prepare the defence.
(9) The long period of detention of the accused and probability of further period of delay. (Assuming the trial takes place on the 23rd as arranged, the period from arrest to trial will be ten days).

Of those points Mr. Salt relied on number 8, and the Deputy Public Prosecutor in opposing the application urged number 7.

Naturally the primary consideration is to ensure the presence of the accused to stand his trial, and bail should not be refused lightly. A man is innocent until found guilty, and failing strong grounds he should be granted bail.

Now there is no suggestion that free access to the accused in custody is denied. Mr. Salt's argument seemed directed more to the inconvenience he himself experienced, than to any difficulty or embarrassment likely to result against the accused in the preparation of his defence.

On the other hand the learned Deputy Public Prosecutor spoke of the likelihood of interference with prosecution witnesses, and that is a strong reason. At page 969 of *Sohoni's* Code of Criminal Procedure it states —

> Any allegation that the accused is tampering or attempting to tamper with evidence would be a cogent ground for refusing bail.

Here the allegation made before and accepted by the learned District Judge is that there was good reason to expect interference with witnesses. I agree with Mr. Salt that it would have been better had the O.C.P.D. appeared in person and satisfied the Court of the allegation made but it is evident that the learned District Judge based his refusal to grant bail on the ground of interference with witnesses.

Now at page 967 of *Sohoni's* Code of Criminal Procedure, 14th edition, it states :—

> .....it is well settled that the High Court will not lightly interfere with the exercise of discretion vested in the lower Court. Where the Sessions Judge refused bail after taking into consideration all the circumstances of the case, the High Court will not interfere with his order.

Learned Counsel for the accused has not satisfied me that the refusal to grant bail will prejudice the accused in the preparation of his defence, and as this is the ground on which the application is based it must be refused.

I should mention, before concluding, the complaint by Mr. Salt that the accused was brought to the Court below in manacles. An accused person is innocent until he is proved guilty, and restraint is not usually required unless the accused is violent or has committed a crime of violence or that he may attempt to escape. As to whether violence or escape was anticipated in this case I do not know. I hope those responsible for the custody of accused persons will bear these observations in mind, and refrain from the use of handcuffs on unconvicted persons unless essential.

There is to be very little delay in trial — four days — it is fixed for March 23rd. On that day the learned District Judge will be in full possession of the facts alleged against the accused. If the trial is not there and then determined the accused has liberty to renew his application for bail.

Order Accordingly.